

Supreme Court, U. S.  
**FILED**

APR 20 1979

MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1978

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No. **78-1607**

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THE MARYLAND LUMBER COMPANY,  
*Petitioner,*  
v.

UNITED STATES OF AMERICA AND W. DONALD BELL,  
SPECIAL AGENT, INTERNAL REVENUE SERVICE,  
*Respondents,*  
AND

THE UNION TRUST COMPANY,  
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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THE MARYLAND LUMBER COMPANY,  
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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

The petitioner, THE MARYLAND LUMBER COM-  
PANY, a Maryland corporation, prays that a writ of  
certiorari issue to review the judgment of the United  
States Court of Appeals for the Fourth Circuit.

**OPINIONS BELOW**

The order of the United States District Court for the  
District of Maryland (Civil Action Number N-77-1074)  
dated August 23, 1977 was not officially reported and

appears at Appendix A, *infra*, page 1a. (The district court rendered no opinion). The opinion of the United States Court of Appeals for the Fourth Circuit (case Number 77-2177) dated December 4, 1978 appears at Appendix B, *infra*, pages 2a-7a, and is reported at 588 F.2d 419 (1978).

### JURISDICTION

The judgment of the court of appeals was filed on December 4, 1978, as appears from Appendix C, *infra*, page 8a. A Petition for Rehearing was filed on December 18, 1978. Rehearing was denied on January 24, 1979, as appears from Appendix D, *infra*, page 9a. This Petition for Certiorari is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### QUESTION PRESENTED

In *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), the Supreme Court of the United States stated that an administrative summons issued by Internal Revenue Service is enforceable by the courts only if it is issued prior to the formation of an institutional decision by Internal Revenue Service to refer the case to the Justice Department for prosecution.

Did the court of appeals err in affirming the order of the district court ordering enforcement of an Internal Revenue Service administrative summons without allowing taxpayer an evidentiary hearing or discovery to test whether or not Internal Revenue Service had made an institutional decision to refer the case to the Justice Department for prosecution prior to the issuance of the summons, when Internal Revenue Service had neither asserted nor alleged nor proven the non-existence of such a decision and when, without discovery or an evidentiary hearing, there was no way

for the taxpayer to test the existence or non-existence of such a decision?

### STATUTES INVOLVED

Several provisions of the Internal Revenue Code, 26 U.S.C., are referred to in this Petition for a Writ of Certiorari. Since the provisions involved are lengthy and are not determinative of the issue, such provisions will be cited herein and their texts are set forth in Appendix E, *infra*, pp. 10a-11a: 26 U.S.C. § 7402(b), 26 U.S.C. § 7602, 26 U.S.C. § 7604(a).

### STATEMENT OF THE CASE

On March 28, 1977 Internal Revenue Service issued and served on Union Trust Company a summons (hereinafter called the "Union Trust Summons") for specified documents and records in the hands of Union Trust Company relating to The Maryland Lumber Company under the authority conferred by § 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602. The Maryland Lumber Company, the Petitioner herein and the taxpayer being investigated by Internal Revenue Service (hereinafter called the "Petitioner"), was duly notified by Internal Revenue Service of service of the Union Trust Summons and requested Union Trust Company not to produce any documents or records in response to the summons. Thereafter the United States of America and W. Donald Bell, Special Agent, Internal Revenue Service (hereinafter collectively called the "Government") instituted proceedings against Union Trust Company to enforce the Union Trust Summons (hereinafter called the "Union Trust Summons Enforcement Case") in the United States District Court for the District of Maryland under the authority conferred by §§ 7402(b) and 7604(a) of the Internal Code of 1954, 26 U.S.C. §§ 7402(b) and 7604(a).

The Petitioner intervened in the proceedings.



A hearing was held by the district court on August 18, 1977. At that hearing the Petitioner urged the district court to permit discovery or an evidentiary hearing so that the Petitioner could test whether Internal Revenue Service had met all of the prerequisites for judicial enforcement of the summons (hereinafter called the "Enforcement Prerequisites").<sup>1</sup> The district court denied the Petitioner both discovery and an evidentiary hearing, and ordered Union Trust Company to produce the documents and records sought by the Union Trust Summons. During the course of the hearing in the Union Trust Summons Enforcement Case, the district court stated that it was denying Petitioner's request for discovery or an evidentiary hearing because the Petitioner had been allowed limited discovery and an evidentiary hearing in an earlier summons enforcement case which, in the opinion of the district court, foreclosed the need for discovery or an evidentiary hearing in the Union Trust Summons Enforcement Case. The earlier summons enforcement case (hereinafter called the "Maryland Lumber Summons Enforcement Case") related to an Internal Revenue Service administrative summons directed to the Petitioner in the same tax investigation and was issued and served on July 13, 1976 (hereinafter called the "Maryland Lumber Summons"). In ordering the Union Trust

<sup>1</sup> In *United States v. LaSalle National Bank*, 347 U.S. 298 (1978) the Supreme Court summarized some of the Enforcement Prerequisites: the summons must be issued before Internal Revenue Service recommends the matter to the Justice Department for prosecution and before Internal Revenue Service, as an institution, has made the decision to make such referral; Internal Revenue Service must at all times use the summons authority in good-faith pursuit of the congressionally authorized purposes of § 7602 of the Internal Revenue Code, 26 U.S.C. § 7602, including the standards of good-faith described in *United States v. Powell*, 379 U.S. 48 (1964), and including the requirement that Internal Revenue Service, as an institution, must not have abandoned the pursuit of civil tax determination or collection.

Summons enforced without allowing the Petitioner discovery or an evidentiary hearing, the district court rejected the Petitioner's argument that the discovery and evidentiary hearing permitted in the Maryland Lumber Summons Enforcement Case only tested compliance with the Enforcement Prerequisites at the time when the Maryland Lumber Summons was issued and that, because the Maryland Lumber Summons was issued eight and one-half months before the Union Trust Summons and because the Government obtained additional substantial evidence in the eight and one-half month interval between the issuance of the two summonses, the Government's institutional position with respect to the Enforcement Prerequisites might well have changed within that time interval.

The Petitioner appealed the decision of the district court in both the Maryland Lumber Summons Enforcement Case and the Union Trust Summons Enforcement Case. A stay of enforcement was issued in the Union Trust Summons Enforcement Case, but not in the Maryland Lumber Summons Enforcement Case, and documents and records were delivered to Internal Revenue Service in response to the Maryland Lumber Summons prior to the issuance of the Union Trust Summons.

The United States Court of Appeals for the Fourth Circuit deferred argument of both appeals pending the decision by the United States Supreme Court in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). In the Supplemental Brief filed by the Petitioner in the Union Trust Summons Enforcement Case following publication of the opinion of the Supreme Court in the *LaSalle* case, and at oral argument before the court of appeals, the Petitioner again urged that it was entitled to discovery or an evidentiary hearing to test compliance by Internal Revenue Service with the Enforce-

ment Prerequisites required for judicial enforcement of the Union Trust Summons. In affirming the decision of the district court, the court of appeals denied the Petitioner the opportunity to explore such compliance by Internal Revenue Service.<sup>2</sup>

### REASONS FOR GRANTING THE WRIT

THE ORDER OF THE DISTRICT COURT, AND THE DECISION OF THE COURT OF APPEALS AFFIRMING THAT ORDER, DECIDE AN IMPORTANT FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

<sup>2</sup> After publication of the decision of the Supreme Court in the *LaSalle* case and prior to argument of the Union Trust Summons Enforcement Case before the court of appeals, the Petitioner dismissed its appeal in the Maryland Lumber Summons Enforcement Case because, in that case, Petitioner had been allowed discovery and an evidentiary hearing to test compliance with the Enforcement Prerequisites and because there had been no stay of enforcement of the Maryland Lumber Summons pending appeal. This additional history of The Maryland Lumber Summons Enforcement Case is supplied because the concurring opinion of the court of appeals, while correctly finding that Internal Revenue Service had not presented to the district court any evidence, allegations or assertions that Internal Revenue Service had met the Enforcement Prerequisites established by the *LaSalle* case concerning existence or non-existence of an institutional decision by Internal Revenue Service to refer the case to the Justice Department for prosecution at the time the Union Trust Summons was issued, and, hence, that the Government had failed to make a *prima facie* case for enforcement of the Union Trust Summons, erroneously held that Petitioner's dismissal of the Maryland Lumber Summons Enforcement Case collaterally estopped Petitioner from complaining about denial of discovery and an evidentiary hearing in the Union Trust Summons Enforcement Case. The evidentiary hearing in the Maryland Lumber Summons Enforcement Case did not test and could not have tested compliance by Internal Revenue Service with any of the Enforcement Prerequisites at the time of the issuance of the Union Trust Summons which was issued eight and one-half months after the Maryland Lumber Summons. This issue is further discussed in the section of this Petition captioned "Reasons for Granting the Writ."

The district court denied the Petitioner both discovery and an evidentiary hearing. Without discovery or an evidentiary hearing, the Petitioner had no way to ascertain whether or not Internal Revenue Service had made an institutional decision to refer the case to the Justice Department for prosecution at or prior to the time that Internal Revenue Service issued the Union Trust Summons. The Government has not, in its pleadings, in its affidavit or otherwise, made any assertion or proffered any evidence that, when the Union Trust Summons was issued, Internal Revenue Service had not made an institutional decision to refer the matter to the Justice Department for prosecution.

In an action to enforce an Internal Revenue Service administrative summons, the district court is required to hold an adversary hearing to permit judicial determination of the challenges to enforcement of the summons. *Reisman v. Caplin*, 375 U.S. 440 (1964). In *United States v. Powell*, 379 U.S. 48 (1964), the Supreme Court held that, at this adversary hearing, the Commissioner of Internal Revenue must preliminarily show compliance with the Enforcement Prerequisites so that judicial enforcement of the administrative summons will not be an abuse of the court's process, and that the taxpayer, in challenging enforcement of the summons, has the burden of proving that judicial enforcement of the summons would be an abuse of the court's process.

The decision of the Supreme Court in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978) reaffirmed that the courts are obligated to make certain good-faith inquiries in deciding whether or not to enforce an Internal Revenue Service administrative summons, and



stated as an example the following Enforcement Prerequisite:

We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution. Such a delay would be tantamount to the use of the summons authority after the recommendation and would permit the Government to expand its criminal discovery rights. Similarly, the good-faith standard will not permit the IRS to become an information-gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases. *Id.* at 316.

In the footnote to the quoted language, the Court added: ". . . The *Powell* elements were not intended as an exclusive statement about the meaning of good faith. . . . The dispositive question in each case, then, is whether the Service is pursuing the authorized purposes in good faith." *Id.* at 317 n.19.

The validity of an Internal Revenue summons is determined at the time that it is issued. *United States v. Rosinsky*, 547 F.2d 249 (4th Cir. 1977).

Internal Revenue Service issued the Union Trust Summons on March 28, 1977, over eight and one-half months after it had issued the Maryland Lumber Summons. At the time of the issuance of the Union Trust Summons, information concerning the existence or non-existence of an institutional decision by Internal Revenue Service to refer the case to the Justice Department for prosecution was solely in the minds of Internal Revenue Service personnel and in the internal, non-public records of Internal Revenue Service. The only manner by which the Petitioner could have gained access to this essential information was through discovery or an evidentiary hearing, both of

which the district court denied the Petitioner. The limited discovery and evidentiary hearing granted to the Petitioner in the Maryland Lumber Summons Enforcement Case tested compliance by Internal Revenue Service with the Enforcement Prerequisites as of eight and one-half months prior to the issuance of the Union Trust Summons and could not possibly have ascertained such compliance at time of issuance of the Union Trust Summons.

Accordingly, the decision of the district court to deny the Petitioner the requested discovery or evidentiary hearing to test the Government's compliance with the Enforcement Prerequisites, and the affirmance of that decision by the court of appeals, are inconsistent with the decision of the Supreme Court in the *LaSalle* case and constitute reversible error for the following reasons:

(1) The *LaSalle* case states that it is improper for a court to enforce an Internal Revenue Service administrative summons issued after Internal Revenue Service has made an institutional decision to refer the case to the Justice Department for prosecution (hereinafter called the "*LaSalle* Decision to Refer Test").

(2) The burden of proof in challenging enforcement of an Internal Revenue Service administrative summons is upon the taxpayer.

(3) Hence, the taxpayer bears the burden of proving that the Internal Revenue Service has made an institutional decision to refer the case to the Justice Department for prosecution.

(4) The evidence required to meet this burden can be obtained by the taxpayer from the Internal Revenue Service only through discovery or an evidentiary hearing.

(5) Denying the Petitioner as a taxpayer the opportunity to conduct discovery or an evidentiary hearing effectively denies the Petitioner the opportunity to meet the burden of proof of determining whether or not the

Government has complied with *LaSalle* Decision to Refer Test, and is reversible error.

The majority opinion of the court of appeals in this case completely ignored the arguments which had been presented that the *LaSalle* Decision to Refer Test, if it is to have any meaning, required that the Petitioner have the opportunity through discovery or an evidentiary hearing to determine whether or not the government had complied with that Test. Instead, the majority of the court of appeals relied upon decisions which preceded the *LaSalle* decision and the articulation of the *LaSalle* Decision to Refer Test, which decisions approved summary enforcement of Internal Revenue Service administrative summonses by the district courts in their discretion under § 81(a)(3) of the Federal Rules of Civil Procedure without discovery or an evidentiary hearing, e.g.: *United States v. Morgan Guaranty Trust Company*, 572 F.2d 36 (2nd Cir. 1978); *United States v. McCarthy*, 514 F.2d 368 (3rd Cir. 1975). Furthermore, the Government's affidavit in support of its Petition for Enforcement in this case, while asserting that there had been no referral for prosecution, was totally silent on the requirements of the *LaSalle* Decision to Refer Test, and thereby failed to make even a *prima facie* case of compliance with that Test, notwithstanding the finding of the majority of the court of appeals to the contrary.

It should also be noted that the concurring opinion of the court of appeals correctly found that the Government had failed to make a *prima facie* case of compliance with the *LaSalle* Decision to Refer Test, but erred in holding that the dismissal of the appeal in the Maryland Lumber Summons Enforcement Case collaterally estopped the Petitioner from pursuing its appeal in the Union Trust Summons Enforcement Case. The collateral estoppel portion of the concurring opinion is in conflict with the decisions of the Supreme Court in *Larsen v. Northland Transp. Co.*, *The Norco*, 292 U.S. 20 (1934) and *Lawlor v. National Screen Service Corp.*,

349 U.S. 322 (1955), and with § 68(2) of the *Restatement of Judgments* (1942) which is consistent with both decisions. § 68(2) of the *Restatement of Judgments* states the principle succinctly as follows: "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

The evidentiary hearing and discovery allowed in the Maryland Lumber Summons Enforcement Case considered only the Government's compliance with Enforcement Prerequisites in the issuance of the Maryland Lumber Summons and did not consider, and could not possibly have considered, whether the Government had complied with Enforcement Prerequisites eight and one-half months later when the Union Trust Summons was issued. The Government's compliance with the Enforcement Prerequisites in connection with the issuance of the Union Trust Summons was not a question of fact actually litigated and determined in the Maryland Lumber Summons Enforcement Case. Hence the judgment in the Maryland Lumber Summons Enforcement Case does not collaterally estop the raising of a new factual issue in the Union Trust Summons Enforcement Case.

A resolution is required of the effect of the *LaSalle* Decision to Refer Test on a taxpayer's rights to discovery or an evidentiary hearing to determine whether or not Internal Revenue Service has met the requirements of that Test at the time of issuance of an administrative summons. Additionally, a resolution is required of the dichotomy between the need for discovery or an evidentiary hearing to test compliance by Internal Revenue Service with the *LaSalle* Decision to Refer Test, and the provisions of § 81(a)(3) of the Federal Rules of Civil Procedure which are applicable to an Internal Revenue administrative summons enforce-



ment case and which permit suspension of the Federal Rules of Civil Procedure, including the Rules which allow discovery and an evidentiary hearing, in such a case. The dichotomy exists because certain Enforcement Prerequisites can be tested only through discovery or an evidentiary hearing, and § 81(a)(3) of the Federal Rules of Civil Procedure authorizes summons enforcement proceedings to be conducted without discovery or an evidentiary hearing.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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### APPENDIX A

*United States District Court  
For The District of Maryland*

*No. N77-1074*

*The United States of America and W. Donald Bell,  
Petitioners,*

*v.*

*Union Trust Company and Maryland  
Lumber Company,  
Respondent.*

### ORDER

This cause having come on for a hearing on August 18, 1977 on the Order to Show Cause issued by this Court, said Order to Show Cause having been issued upon the petition of the United States and Special Agent W. Donald Bell, seeking judicial enforcement of a summons issued by Special Agent Bell to respondent, Union Trust Company, and Maryland Lumber Company having intervened as a respondent; the Court having heard the arguments of counsel for all the parties, together with the pleadings and exhibits, it is

ORDERED that respondent, Union Trust Company, be, and hereby is, directed to make available to Special Agent Bell, within fourteen days of August 18, 1977, the documents sought in the summons of March 28, 1977.

Dated at Baltimore, Maryland this 23th day of August, 1977.

/s/ EDWARD S. NORTHROP,  
Chief, United States  
District Judge.

2a

APPENDIX B

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*United States Court of Appeals  
For The Fourth Circuit*

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No. 77-1816

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*United States of America and Wendell Edwards,  
Special Agent, Internal Revenue Service,  
Appellants,*

v.

*T. R. McGuirt, as President of McGuirt's Electric, Inc.,  
and McGuirt's Electric, Inc.,  
Appellees.*

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*Appeal from the United States District Court for the  
Western District of North Carolina,  
at Charlotte. James B. McMillian, District Judge*

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No. 77-2177

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*United States of America and W. Donald Bell,  
Special Agent, Internal Revenue Service,  
Appellees,*

v.

*Maryland Lumber Company,  
Appellant,  
and The Union Trust Company,  
Defendant.*

3a

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

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Argued October 5, 1978 Decided: December 4, 1978.

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Before BUTZNER, WIDENER, and HALL, Circuit Judges.

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HALL, Circuit Judge:

These appeals were consolidated because the primary issue presented in both is whether a summons issued by the Internal Revenue Service (IRS) is enforceable if it was issued in aid of an IRS criminal fraud investigation.

We delayed determination of this issue until the Supreme Court decided *United States v. LaSalle National Bank*, 46 L.W. 4713 (June 19, 1978). The holding in *LaSalle* adopted the position taken by the IRS in both these cases: an internal revenue summons is enforceable if issued before the IRS recommends to the Department of Justice that a criminal prosecution be undertaken in regard to matters reasonably related to the subject matter of the summons and if, prior to such recommendation, it was issued for purposes authorized under 26 U.S.C. § 7602, including the elements of "good faith" announced in *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

In the Union Trust Company case, the district court summarily enforced the summons notwithstanding taxpayer's defense that it was issued solely in aid of an IRS criminal fraud investigation. We affirm.

In the McGuirt case, the district court refused to enforce a summons because the IRS would not produce information which would disclose the identity of a confidential informant. The district court apparently premised its result upon its understanding, before

*LaSalle*, that a summons could not be issued in "good faith," if it was issued for a criminal fraud investigation. We reverse and remand for summary enforcement.

Taxpayers contend that summary enforcement is not a proper disposition of their respective cases. We disagree. A separate discussion of the facts and posture of each case is required.

#### UNION TRUST COMPANY

In the Union Trust Company case, a summons was issued for bank records after a previous summons, enforced by court order, was not honored by the taxpayer, Maryland Lumber Company. Taxpayer alleged that the summoned documents had been stolen during a burglary of the office of its public accountant. In the second enforcement proceeding, the subject of this appeal, the IRS agent supported his petition for enforcement with an affidavit stating that the summons had been issued in good faith and that no recommendation for prosecution of the taxpayer had been made to the Department of Justice at the time of the petition for the second summons. In its response, the taxpayer, as intervenor, renewed the defense asserted in the first proceeding — that the summons was issued solely in aid of a criminal investigation — and requested discovery and an evidentiary hearing. At hearing, the district court held it was bound by its previous determination and summarily enforced the summons without allowing taxpayer discovery or a second evidentiary hearing. We affirm.

The petition, with its supporting affidavit which asserted the continuing good faith purpose of the IRS prior to any institutional recommendation for prosecution to the Department of Justice, constituted a *prima facie* showing sufficient to warrant enforcement. The substance of taxpayer's defense had already been determined against it by the court several months before, no new facts supporting its defense were alleged, and no affidavits countering the agent's affidavit were submitted. Therefore, we think the district court

properly acted within its discretion, in reliance upon usual court rules for summary procedure, to deny discovery and an evidentiary hearing. *United States v. Morgan Guaranty Trust Co.*, 572 F.2d 36, 42 (2nd Cir. 1978); *United States v. McCarthy*, 514 F.2d 368, 373-76 (3rd Cir. 1975) cited in *United States v. Rosinsky*, 547 F.2d 249, 254 (4th Cir. 1977).

#### McGUIRT

In the McGuirt case, the taxpayer, T. R. McGuirt, asserted two defenses: first, that the summons was issued solely in aid of a criminal investigation, and second, that because an IRS agent had been given an opportunity several months before to copy the summoned records, the information sought is in the possession of the IRS and enforcement of the summons would be tantamount to harassment.

At the hearing following discovery, it was admitted that the IRS initiated its investigation on the basis of an informant's tip and the district court considered inquiry into the origination of the investigation to be essential for determination of the IRS's purpose, whether civil or criminal. The IRS objected to producing the information provided by the informant because it would reveal his identity. Thereupon, the court stopped the proceedings until the IRS agreed to produce that information. In this posture, the case was appealed.

In his brief and at oral argument, taxpayer's counsel concedes that the IRS has abandoned its criminal fraud investigation and, therefore, the issue of criminal purpose is moot. But he objects to remand for enforcement because the harassment issue has not been fully litigated. Taxpayer contended that the IRS already had the information sought in its possession. Affidavits for taxpayer were submitted which show that an IRS agent was given an opportunity to copy records now sought by the summons. At hearing, the agent testified that he had in his possession a copy of only one document sought by the summons. On cross examination by



taxpayer's counsel, he testified that he had visited taxpayer's business on four occasions spanning a four-month period and, although all taxpayer's records were generally made available to him for viewing and copying, he had copied only one document and had made some notes from the records he had viewed. The total time spent at taxpayer's business was approximately twenty-five hours. His last visit was six months before the summons was issued. None of the taxpayer's affidavits dispute the agent's testimony, and one affidavit executed by taxpayer's bookkeeper states that the agent did not copy the documents made available to him.

Reading such facts in light most favorable to taxpayer, we think the IRS has met its burden of proving a good faith purpose for the summons, and we can find no inference of bad faith purpose which could possibly arise upon the facts asserted in taxpayer's affidavits. The only inference which arises is that issuance of a summons after having an opportunity to copy documents constitutes an inconvenience for taxpayer.<sup>1</sup> But inconvenience is not harassment and does not make out a requisite defense that the summons was issued in bad faith. Because no material issue of fact remains, we think summary procedure is warranted, and enforcement of the summons as to all documents except the one already in the IRS's possession is appropriate on remand. E.g. *United States v. Morgan Guaranty Trust Co.*, *supra*.

Therefore, the enforcement order of the district court in the Union Trust Company case is affirmed and the decision of the district court in the McGuirt case is reversed and remanded for enforcement of the summons.

*Affirmed as to Defendant Union Trust Company; reversed and remanded as to Defendant McGuirt.*

<sup>1</sup> Taxpayer has not alleged a violation of 26 U.S.C. § 7605(b), which limits second inspections.

WIDENER, Circuit Judge, concurring:

I concur in the result and in the opinion of the court in the *McGuirt* case, No. 77-1816.

I concur in the result in *The Union Trust Company* case, No. 77-2177.

I do not think the affidavits which were the only evidence before the district court, and upon which the case was decided, meet the requirements of *LaSalle* because they do not even address the subject of the institutional commitment of the Internal Revenue Service with respect to a prosecution, other than that no recommendation to prosecute had been made, and do not mention any facts from which could be decided the matter of . . . "delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution." *LaSalle*, 46 L.W. at 4718.

Nevertheless, I believe the same matters now before the court were litigated in *United States v. Maryland Lumber Company*, No. 77-1338, an appeal in which case was pending in our court until recently, when it was dismissed by agreement on October 5, 1978. I think the principle of collateral estoppel bars the further prosecution of this appeal since the judgment adverse to the taxpayer in *Maryland Lumber Company* is final.

8a

APPENDIX C

*Judgment*

*United States Court of Appeals for  
The Fourth Circuit*

No. 77-2177

*United States of America and W. Donald Bell,  
Special Agent, Internal Revenue Service,  
Appellees,*

*v.*

*Maryland Lumber Company  
Appellant,  
and The Union Trust Company  
Defendant.*

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ WILLIAM K. SLATE, II,  
Clerk,  
December 4, 1978

9a

APPENDIX D

*United States Court of Appeals  
For The Fourth Circuit*

No. 77-2177

*The United States of America and W. Donald Bell,  
Special Agent, Internal Revenue Service,  
Appellee,*

*v.*

*Maryland Lumber Company,  
Appellant,  
and the Union Trust Company,  
Defendant.*

ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall for a panel consisting of Judge Butzner, Judge Widener, and Judge Hall.

For the Court,

/s/ WILLIAM K. SLATE, II,  
Clerk.

January 24, 1979.

## APPENDIX E

Internal Revenue Code of 1954 (23 U.S.C.):

Sec. 7402. Jurisdiction of District Courts

(b) TO ENFORCE SUMMONS.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Sec. 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Sec. 7604. Enforcement of Summons

(a) JURISDICTION OF DISTRICT COURT.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.



## **XI. GENERAL PROVISIONS**

### **Rule 81. Applicability in General**

#### **(a) To what proceedings applicable.**

(3) . . . These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

JUN 7 1979

MICHAEL RODAK, JR., CLERK

No. 78-1607

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*In the Supreme Court of the United States*

OCTOBER TERM, 1978

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MARYLAND LUMBER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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WADE H. MCCREE, JR.  
*Solicitor General  
Department of Justice  
Washington, D.C. 20530*

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Petitioner seeks review of an order enforcing an Internal Revenue summons directing a bank to produce its business records relating to petitioner's accounts with the bank. Petitioner contends that the district court erred in denying it an evidentiary hearing or discovery to explore the question whether the Internal Revenue Service had made an institutional decision to refer the case to the Department of Justice for prosecution prior to the issuance of the summons.

The records sought by the summons contain information similar to that sought by an earlier summons issued to petitioner. Although the same district court ordered the previous summons enforced, petitioner failed to comply with the summons. (*United States v. Maryland Lumber Co.*, No. N-76-1664 (D. Md. Jan. 25, 1977), appeal



dismissed, No. 77-1338 (4th Cir. Oct. 5, 1978)). Upon representations from counsel that the information sought was the same information which it had previously ordered petitioner to produce, and that petitioner's defense to the summons was the same as in the previous case, the district court ordered this summons in this case enforced. The court of appeals affirmed. In its view, the government established a *prima facie* case for enforcement of the summons and petitioner had not presented any new facts in support of its defense or any affidavits countering the government's showing. It therefore held that the district court did not abuse its discretion in summarily disposing of the case and denying petitioner discovery and an evidentiary hearing (Pet. App. 4a-5a).

The decisions of this Court uniformly hold that the government need make only a *prima facie* showing that it is entitled to enforcement of an Internal Revenue summons and that such a showing shifts to the party opposing enforcement the burden of proving that enforcement would constitute an abuse of the court's process. See, e.g., *United States v. Powell*, 379 U.S. 48 (1964); *Donaldson v. United States*, 400 U.S. 517 (1971); *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). Here, petitioner's only defense to the summons was one that was previously rejected by the district court: that the summons was issued solely for criminal investigative purposes because the agent had formed a firm purpose to recommend prosecution. But as this Court pointed out in *United States v. LaSalle National Bank*, *supra*, 437 U.S. at 314-317, the critical inquiry is whether the Internal Revenue Service has abandoned its institutional responsibility to collect taxes and civil fraud penalties. That a single agent intends only to gather evidence for a criminal investigation is not dispositive of the institutional good faith of the Internal Revenue

Service. There was, accordingly, no need for a hearing or discovery because neither procedure could have benefited petitioner.

Here, as the court of appeals recognized (Pet. App. 4a), petitioner alleged no new facts and did not present any affidavits countering the agent's affidavit in support of the petition for enforcement. In the absence of even the allegation of a colorable defense to the summons, the district court's enforcement of the summons in the absence of either a hearing or discovery was entirely appropriate. *United States v. Morgan Guaranty Trust Co.*, 572 F. 2d 36 (2d Cir. 1978), cert. denied, No. 77-1586 (Oct. 2, 1978); *United States v. Church of Scientology of California*, 520 F. 2d 818 (9th Cir. 1975); *United States v. Newman*, 441 F. 2d 165 (5th Cir. 1971).

Petitioner further argues (Pet. 7-9) that the government had the burden of showing that the summons was not issued after an institutional decision by the Internal Revenue Service to refer the case to the Department of Justice for prosecution. But this Court has held that the party challenging the summons has the burden of proving that the summons was issued for an improper purpose (*United States v. Powell*, *supra*), including the burden of disproving the actual existence of a valid civil tax determination or collection purpose by the Service (*United States v. LaSalle National Bank*, *supra*, 437 U.S. at 316). Petitioner failed to allege any facts that would, if proved, have met that burden.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

JUNE 1979

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FILED

JUN 25 1979

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**MEMORANDUM IN RESPONSE TO MEMORANDUM  
FOR THE UNITED STATES IN OPPOSITION**

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The Memorandum for the United States in opposition to the Petition for a Writ of Certiorari filed by the Solicitor General of the United States (hereinafter referred to as the "Government's Memorandum") correctly states Petitioner's contention that the District Court erred in denying Petitioner an evidentiary hearing or discovery to explore the question of whether the Internal Revenue Service had made an institutional decision to refer the case to the Department of Justice for prosecution prior to issuance of the summons. In *United States v. LaSalle National Bank*, 437 U.S. 298

(1978), the Supreme Court articulated the principle that once Internal Revenue Service had made such an institutional decision, it would be improper for Internal Revenue Service to issue an administrative summons for the production of documents and records.

The Government's Memorandum first attempts to becloud the issue posed by the Petition for a Writ of Certiorari (hereinafter referred to as the "Petition") by claiming that the Petitioner failed to comply with an earlier summons which the District Court had ordered enforced in *United States v. Maryland Lumber Company*, No. N-76-1664 (D. Md. January 25, 1977). That same assertion was made for the same purpose by the Department of Justice lawyer in oral argument before the United States Court of Appeals for the Fourth Circuit. The fact is that the Petitioner fully complied with the earlier summons to the extent that the summoned documents and records were in its possession or available to it. Generally, a contumacious failure to comply with any Internal Revenue summons will result in a contempt hearing before the District Court, and no such contempt hearing has been requested by the government lawyers. The efforts of the Solicitor General to suggest that the Petition should be denied because the Petitioner did not comply with an earlier summons in the same investigation is factually incorrect and is an unwarranted effort to characterize the Petitioner, and hence its Petition, as unworthy of consideration.

The Government's Memorandum next asserts that the government has made a *prima facie* showing that it is entitled to enforcement of the summons in this case and that such showing shifts to the Petitioner the burden of proving that enforcement would constitute an abuse of the court's process. The fallacy here is the assertion that the government has established its *prima facie* showing which entitles it to enforcement of the

summons. The summons enforcement case which is the subject matter of the Petition was heard by the District Court on August 18, 1977, almost a year before the Supreme Court handed down its decision in the *LaSalle National Bank* case. Thus, the District Court's conclusion that the government had established a *prima facie* case for enforcement of the summons could not have considered the principle enunciated in the *LaSalle* opinion that once Internal Revenue Service had made an institutional decision to refer a case to the Justice Department for prosecution, it was too late for it to issue an administrative summons for the production of documents and records. Moreover, there is absolutely no affidavit or other assertion or evidence of any kind in the record which in any way indicates that Internal Revenue Service had not made an institutional decision to refer the case to the Justice Department for prosecution at the time that it issued the summons in question. Contrary to its own assertion, it is clear that the government has failed to make a *prima facie* case for enforcement of the summons.

Finally, the Government's Memorandum's characterization of the Petitioner's defense to the summons is completely erroneous when it states that such defense is based on the assertion that the summons was issued solely for criminal investigative purposes because the agent had formed a firm purpose to recommend prosecution. The Petitioner is as aware as the government must be that the existence or nonexistence of a valid civil tax determination or collection purpose by Internal Revenue Service is totally irrelevant to the enforceability of a summons issued after Internal Revenue Service has made an institutional decision to refer the matter to the Justice Department for prosecution. As clearly stated in the Petition, and as reiterated herein, the Petitioner's defense to the summons is based upon the fact that there is nothing in the record concerning whether or not Internal Revenue Service

had, at the time that the summons was issued, made an institutional decision to refer the matter to the Justice Department for prosecution, that the Petitioner was denied any means of testing the existence or nonexistence of such an institutional decision and that such denial made it impossible for the Petitioner to carry its burden of proof in resisting the summons. Because the summons in this case was issued 8½ months later than the prior summons for which the Petitioner was allowed an evidentiary hearing, and because, as asserted in the Petition, the validity of an administrative summons must be tested at the time of its issuance, the Petitioner was denied the only legal means for obtaining the facts which it could allege or present in an affidavit to resist enforcement of the summons.

It is therefore respectfully submitted that the Government's Memorandum is totally without merit and that the Writ of Certiorari should be granted by the Supreme Court.

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